1955

Karen Anderson Fahey v. Wilbur J. C. Fahey : Brief of Respondent

Utah Supreme Court

Skeen, Thurman, Worsley & Snow; Attorneys for Plaintiff and Respondent;

No. 8373

IN THE SUPREME COURT
of the
STATE OF UTAH

KAREN ANDERSON FAHEY,
Plaintiff and Respondent,

— vs. —

WILBUR J. C. FAHEY,
Defendant and Appellant.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Respondent is not satisfied with the statement of facts set forth in appellant's brief for the reason that it is incomplete, misleading and confusing. It pays little heed to the evidence establishing cruelty, on which ground the Trial Court awarded a decree of divorce to respondent. Therefore, respondent will set forth her own factual statement. Appellant's references to the record apparently refer to the typewritten numerals at the upper right hand corner of the transcript of testimony, but the respondent, when referring to the record, will use the red

numerals placed at the bottom of each page of the record by the Clerk of the lower court. In this connection, it is noted that the red-numbered pages 95 and 106 are duplicates and that page 95 is not in proper sequence with the preceding and following pages. The parties will be designated as they appeared upon trial.

STATEMENT OF FACTS

Plaintiff and defendant were married in the Hawaiian Islands on October 9, 1948, immediately following the completion by plaintiff of a mission for the L.D.S. Church. Plaintiff met the defendant during the course of her mission work and the acquaintance grew to a closer relationship by means of exchange of letters. Before the marriage there was no courtship, in the ordinary sense of that word, between the plaintiff and defendant in view of the position occupied by the plaintiff in the mission field. This was plaintiff's first marriage.

In the spring of 1949, the parties moved to Salt Lake City. Defendant's child by a former marriage, Susan, who was age 14 at the time of trial, made her home with the parties and it is apparent from the entire record that plaintiff then had, and has always had, a deep and abiding affection and love for this child. With the consent of the defendant, plaintiff adopted Susan as her child in the District Court of Salt Lake County several years prior to the institution of this divorce action. The only

issue of the marriage is a son, Michael, born July 17, 1954.

Plaintiff's health has never been good, and in the years immediately preceding 1954 plaintiff suffered three miscarriages, was anemic and underwent surgery and other medical treatment in an effort to enable herself to carry a child and to correct the anemic condition.

Plaintiff and defendant apparently never made the physical, mental and sexual adjustments necessary for a successful marriage. They apparently had not even held hands prior to the marriage, and following their first physical contact, plaintiff testified she was "terrified" (R. 43). Her fear of the defendant because of the physical and sexual treatment inflicted upon her gradually grew to hate (R. 43, 44), which emotion "slowly evolved" (R. 45).

In this most tense and potentially dangerous situation, defendant revealed himself to be possessed of an explosive and ungovernable temper. He threw food and dishes out the back door (R. 44). He threw telephone books across the room and screamed at plaintiff (R. 44). Although he knew plaintiff was a devout member of the L.D.S. Church, he cursed the Temple and stormily criticized the church and its authorities (R. 9, 10, 44).

Such conduct was, unfortunately, not a rare occurrence. It happened "frequently" (R. 9). "Night after

night,'' the peace and quiet of the family dinner table was violated by defendant angrily shouting and yelling his criticism of plaintiff, her family, her friends and her church (R. 9, 10). He threatened plaintiff in obscene language (R. 11) and although he struck plaintiff physically only twice, he constantly threatened to strike her and apparently vented his spleen by spanking Susan on frequent occasions.

According to his own admission, he slapped Susan a number of times (R. 88, 89). On the last such occasion, streaks were thus raised on the child's face (R. 68). He took her into the bathroom on this occasion and began to slap her. Her body was bumping against the wall. He was ''hitting . . . with the swing of his arm, from side to side, about the face and head of his daughter . . .'' (R. 68). He stopped only when threatened with the police. As the Trial Court no doubt observed, he is a large and powerful man.

One of plaintiff's principal grounds of complaint concerned defendant's practice of forcing himself on her physically for sexual gratification at times when she was sick (R. 11), or after a family fight (R. 11 and 37), and also after she had had a reaction from an improper blood transfusion (R. 11).

Defendant is a member of the Air National Guard. His entire course of conduct, as revealed by this record, perhaps can best be pictured when it is noted that the

defendant described himself in these words: "I am a Master Sergeant, as you know, and I like to feel that the people listen to me . . ." (R. 90).

Plaintiff endured this tension-filled atmosphere solely because she wanted to make a home for herself and the child Susan (R. 47, 48), but when the defendant's conduct continued without change, even after the parties' own child was born, plaintiff determined that she could no longer live with the defendant. Her decision in this regard was hastened by the defendant's brutal slapping of the child Susan and his smashing her from wall to wall in the bathroom on August 11, 1954, as related by Mrs. Byron Anderson Lindsay, plaintiff's mother (R. 68). Defendant's violent temper is nowhere in the record better exemplified than by the incident in question. He stopped only when Mrs. Lindsay threatened to call the police. Contrary to appellant's assertion that the facts surrounding this incident are confused and the evidence conflicting, the facts are crystal clear and were admitted by the defendant on his direct examination. In the cross examination of Mrs. Lindsay, counsel carefully refrained from attempting any attack upon Mrs. Lindsay's version of the incident.

An examination of plaintiff's cross examination indicates that her direct testimony concerning the principal grounds of cruelty was never shaken. Rather, counsel, upon his cross examination, attempted to establish that

plaintiff, prior to and shortly following the marriage, was emotionally unstable, apparently in the mistaken belief that if such a condition could be established it would constitute provocation for the defendant's unwarranted acts of cruelty.

Finally, appellant's brief is replete with insinuations and inuendo that the real cause of this divorce was defendant's mother-in-law. Such a claim is without foundation in the evidence, for the defendant, although invited by his counsel to testify to this effect, stated (R. 85) that after his mother-in-law moved to Salt Lake City he "had a feeling our marriage was not quite as private as it had been and I felt that somehow there was more than one person had — I seemed to feel an influence." The last paragraph of defendant's testimony (R. 92) outlines the defendant's theory of the difficulty with the marriage, and it is interesting to note that although the defendant assigned a number of reasons for the marriage difficulty, at no time did he mention the influence of his mother-in-law.

Upon this state of the record the Trial Court found that defendant had been guilty of cruel treatment, causing plaintiff great mental distress, and awarded plaintiff a decree of divorce. The disposition of property, as outlined by the Trial Court, was formulated in an effort to make certain plaintiff would have a place to live for herself and the children and recognized that she had

the greater need for the family automobile than did the defendant. No doubt much of the Trial Court's disposition of property was dictated by the fact that plaintiff had worked throughout the major portion of the marriage and must now continue to work. She has made substantial financial contributions to the assets accumulated during the marriage. She was awarded the furnishings in the family home, the use of the home, and the family car. She is still paying for the car. She was awarded $125.00 per month for support money for the children. Defendant earns approximately $450.00 per month and thus it is seen he retains more than 70% of his income for his own use.

STATEMENT OF POINTS

I. THERE WAS AMPLE COMPETENT EVIDENCE TO SUPPORT THE INTERLOCUTORY DECREE AWARDED TO PLAINTIFF BY THE TRIAL COURT.

II. THE TRIAL COURT DID NOT COMMIT ERROR IN REJECTING DEFENDANT'S EXHIBITS AND PROFFERS OF PROOF AND, IN ANY EVENT, DEFENDANT HAS FAILED TO SHOW HE WAS PREJUDICED BY THE COURT'S RULINGS.

ARGUMENT

I. THERE WAS AMPLE COMPETENT EVIDENCE TO SUPPORT THE INTERLOCUTORY DECREE AWARDED TO PLAINTIFF BY THE TRIAL COURT.

A thorough examination of the record in this case

can leave no doubt that there was ample competent evidence to support the Trial Court's findings. From the beginning of the marriage plaintiff was not in good physical health and obviously she was mentally distressed by the cruelty of the defendant. Despite this fact, and despite the fact that her condition was well known to her husband, the record reveals that at no time did he make any effort to change his conduct, but rather continued to allow free rein to a temper which mounted in ferocity the more his will was thwarted. Courts do not and should not condone conduct such as is revealed by this record.

Defendant complains that the Trial Court committed an act of judicial legislation in that this divorce, so he claims, was granted upon the ground of incompatability. It is suggested that the remarks of the Trial Court be read in context and in their entirety in order that the attitude of the Court may be fairly appraised.

The Trial Court never used the word "incompatability," but counsel constantly suggested that this was the ground of the Court's ruling. To this comment, the Court simply said, "The Supreme Court just about decided it in that case." The Court was apparently referring to the case of *Hendricks* vs. *Hendricks,* 257 P. 2d 366, decided in 1953. When counsel asked if the divorce in the present case was being granted on the grounds of incompatability, the Court replied, "I have not discussed this one yet." The Court was merely outlining what he

felt to be a comparable situation to the case at bar.

Counsel then commenced his argument, claiming that there were no grounds for a divorce, but the Court said (R. 99), "He screams and shouts and indulges in sex relations without adequate preliminary preparation, that is sufficient for a divorce for a sensitive person."

In commenting upon the defense raised by the defendant to this action, the Court summed up its views of the entire case in this language:

> "Most of the evidence you are offering is not showing he was driven to it. I think there are sufficient grounds if we cannot see the marriage as feasible to grant the remedy." (R. 103).

Thus it appears that the Court felt that there had been cruelty on the part of the defendant, that all of the fault had not been on one side, that the marriage relationship was intolerable, and that if the court ordered them to go along as man and wife, they nevertheless would not reconcile (R. 103). This seems to respondent to bring the case at bar squarely within the *Hendricks* case, and particularly within that portion of Mr. Justice Wade's opinion wherein he said:

> "From anything that appears in the instant case, no good purpose, either social, moral, ethical or legal could be served by refusing to grant a divorce and settle the property rights of the parties. It would be but a mockery of the true concept of matrimony to thus purport to compel these two people, clearly ill suited and maladjusted to each

other to continue to retain the legal relationship of husband and wife."

"Incompatability," as that term is customarily used, is not a ground for divorce in the State of Utah. The Trial Court did not grant this divorce on such a ground. Rather, the Court found that the defendant had treated the plaintiff cruelly, and that such conduct to a less sensitive person might be overlooked, but that each case must be decided upon its own facts, having in mind the nature and characteristics of the parties involved. The Court merely stated what seems to respondent to be palpably clear: that what constitutes cruelty to one person may be of no moment or bother to another person.

Defendant, being confronted with a record replete with evidence of cruelty, has entered, as expected, a denial of such conduct, stating (R. 90) that the conduct as related by plaintiff was not his "normal way around the house." The Trial Court, as the trier of the fact, was in position to observe the witnesses upon the witness stand and to judge their credibility, and as is clear from the summary of the case given by the Court, he found plaintiff's specific allegations more believable than the perfunctory denial by the defendant.

Counsel for defendant apparently recognizes the fundamental proposition that under these circumstances, it is his burden to convince the Supreme Court that the evidence is insufficient to support the findings of the

Trial Court and that prejudicial error has resulted. Counsel thereupon, in his brief, undertakes to fulfill this formidable task by tacitly admitting that defendant was guilty of cruel conduct, but throws the blame upon the mother-in-law and upon plaintiff, who, he says, goaded the defendant into his cruelty.

We challenge counsel to cite any instance in the record from which a fact can be inferred that the mother-in-law was in any way interfering with the marriage. Counsel did not seek to draw evidence of such interference from his client, nor did he question plaintiff about this phase of the case. Further, he confined his examination of the mother-in-law to searching out the question of whether or not she had eavesdropped at a reconciliation meeting attended by the parties. Such unwarranted accusations of interference are not supported in any way by the record. In his decision, the Trial Court said:

> "We have not had any evidence here as to any particular like or dislike on the part of plaintiff's mother . . ."

The claim that Mrs. Lindsay was furthering her designs and schemes, as alleged on page 21 of counsel's brief, not only is without basis anywhere in the evidence, but is an unseemly attempt to turn the attention of this Court from the true facts in the case in an effort to arouse prejudice in the eyes of the reviewing authority.

Likewise there is no evidence in the record to support the charge that plaintiff goaded the defendant into his cruelty. Defendant's counsel repeatedly insisted plaintiff was, and is, neurotic. The Trial Court apparently believed this to be so (R. 102). But, defendant has cited no authority for the proposition that a husband, whose wife is so afflicted, may treat his wife cruelly and then escape the consequences of his conduct upon the ground that the affliction provoked the cruelty.

It is clear from plaintiff's testimony that she had endured much in the years prior to Michael's birth in 1954. She apparently hoped that with the birth of their child things would be better for the family. It was only when defendant stood over the crib of the child and screamed and shouted at plaintiff that she realized that her efforts had been futile and that the marriage was impossible. Even so, she was not provoked into instituting an action in the courts until she learned of the defendant's unwarranted beating of the child Susan as related by Mrs. Lindsay. It is reasonable to infer from the evidence that she examined the welts on the child's face and heard the child's story, and that she thereupon determined to obtain a divorce. Defendant's attitude throughout this marriage is thoroughly exemplified when he seeks to excuse his beating of Susan by alleging she was "bordering on delinquency" (Brief, page 9). There is no evidence to support this charge and it ill behooves either the defendant or his counsel to place such an accusation

against a child in an official record in this state.

A fair reading of defendant's brief leads irresistibly to the conclusion that defendant admits there was evidence of cruelty, but that defendant contends the Trial Court should have believed defendant's testimony rather than the evidence offered by plaintiff and on her behalf. Defendant apparently asks that the Supreme Court substitute its judgment for the judgment of the Trial Court, but no reason is assigned why this Court ought to depart from the long-established principle that the Court: "will not upset findings of the Trial Court on issues in which the testimony was in conflict, unless the record shows that such findings are clearly against the weight of the evidence." *Schuster v. Schuster,* 88 Utah 257, 53 P. (2d) 428; *Alldredge v. Alldredge,* 229 P. (2d) 681.

This Court has consistently followed this policy because, as stated in the *Alldredge* case:

> "The Trial Court has a better opportunity to judge the credibility of the witnesses and weight of their testimony. Especially is this true in cases involving quarrels between spouses."

In a case decided in 1952, the appellant claimed that the Supreme Court should examine the record and should reverse the decree of the Trial Court and instead grant him a divorce. He also contended that the property division by the Trial Court was not supported by the evidence. In rejecting appellant's contention, this Court said:

> "This court is reluctant to modify a divorce decree because usually the evidence is contradictory and the Trial Court having seen and heard the witnesses, is more able to determine their credibility than we are. Also, in the absence of an abuse of discretion we do not disturb the property division." *Lawlor v. Lawlor,* 240 P. (2d) 271.

It is perfectly clear from the record in this case that the Trial Court was convinced that the evidence proved cruelty causing great mental distress to a degree sufficient to constitute grounds for a divorce under Utah Law. An examination of the comments of the Trial Court after both sides had rested, reveals at least five separate statements to this effect. (R. 99, 101, 102, 103, 111).

The Trial Court was unusually careful in his determination of the facts in this case and in his disposition of the marriage property. Defendant claims in his brief that he salvaged nothing from the marriage. It is perhaps appropriate to point out that the defendant by his conduct is not entitled to salvage anything from this marriage, which his conduct wrecked. Title 30-3-9, UCA, 1953, provides:

> "When a divorce is decreed the guilty party forfeits all rights acquired by marriage."

The Trial Court, despite this statute, did not deprive defendant of his equity in the family residence, even though counsel for appellant would have us believe that

the disposition of the residence property by the Trial Court constitutes an "illusory" award to the defendant.

Counsel claims that the award is "illusory" because if the house is sold plaintiff would be entitled to recover from the proceeds the amounts she pays for mortgage payments, interest and taxes from the date of the divorce to the date of sale. A moment's reflection will show that with each such payment the equity of the parties increases and assuming that the present value of the house is not changed by inflation or deflation, defendant is still entitled to his portion of his present equity and plaintiff, if the house should be sold, will merely be reimbursed for what she has paid. Defendant seems to assume that such reimbursement will come from his share of the equity, but once again the facts do not bear out this contention.

II. THE TRIAL COURT DID NOT COMMIT ERROR IN REJECTING DEFENDANT'S EXHIBITS AND PROFFERS OF PROOF AND, IN ANY EVENT, DEFENDANT HAS FAILED TO SHOW HE WAS PREJUDICED BY THE COURT'S RULINGS.

Defendant complains because the Trial Court rejected Exhibits 1, 2, 3 and 8 through 15. All of these Exhibits, except Exhibit 15, were letters which passed from plaintiff to defendant in the summer of 1948, several months before the parties were married. The letters indicate that plaintiff professed love for the defendant and in

fact, her letters to him and the letters he presumably wrote her constituted the only courtship that these parties experienced before the marriage.

However, the letters in no way tend to disprove plaintiff's contention that her superior in the mission field exerted pressure upon her to get married in the Hawaiian Islands. Plaintiff admitted that she loved the defendant before the marriage and the rejected exhibits merely tend to confirm that fact, but it seems abundantly clear that plaintiff might not have wanted to get married at that time and in that place, particularly in the absence of her family. Thus it is seen that the letters do not support defendant's contention.

Even if the Exhibits did tend to disprove plaintiff's testimony, defendant has cited no authority to show, nor has any argument been made, that the Exhibits were material to the issues in the case by way of defense or explanation for defendant's conduct.

Defendant likewise complains that the court committed error in refusing to allow him to obtain certain witnesses to testify in accordance with the offer of proof outlined by counsel for the defendant (R. 93, 94). No attempt was made in the lower Court and none has been made here to show what, if any, effect such testimony could have had upon the issues in this case. There is no showing that any of the evidence was material or

would have constituted a defense sufficient to inure to defendant's benefit.

It is a familiar doctrine that the conduct of the trial by the Trial Court is a matter largely within the discretion of that Court, and unless it is shown upon appeal that the Court abused its discretion to the prejudice of the appellant, the rulings of the Trial Court will ordinarily not be disturbed.

It is submitted by the plaintiff that neither the record nor defendant's brief on appeal reveal an abuse of discretion, and even if an abuse of discretion could be inferred from the record, there has been no showing that prejudice resulted to the defendant. The Trial Court evidently assumed much of what defendant desired to prove, because he commented on several occasions to the effect that plaintiff was overly sensitive and in fact implied that he thought she was neurotic (R. 102).

CONCLUSION

This case was tried in the District Court, March 8, 1955. Prior to that time there had been three separate hearings, concerning the conduct of the defendant or the disposition of the property or the children (R. 109). Following trial in March, defendant objected to the proposed Findings of Fact and the parties again appeared before

the Trial Court. At that time, after full argument, the Trial Court made changes in the proposed Findings. Therefore, the Findings of Fact and Decree represent the considered and deliberate judgment of the Court.

Under these circumstances, and in view of the entire record, we submit the decision of the lower Court is correct and ought to be affirmed.

Respectfully submitted,

SKEEN, THURMAN, WORSLEY
& SNOW

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